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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re TWITTER INC. SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	Case No. 4:16-cv-05314-JST (SK) CLASS ACTION PLAINTIFFS' NOTICE OF MOTION AND MOTION TO EXCLUDE EXPERT TESTIMONY OF PROFESSOR WAYNE GUAY; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF TRIAL DATE: March 30, 2020 DATE: March 3, 2020 TIME: 2:00 p.m. CTRM: 6 JUDGE The Honorable Jon S. Tigar

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 3, 2020 at 2:00 p.m. in Courtroom 6, 2nd Floor of the above-entitled court, Class Representatives KBC Asset Management NV and National Elevator Industry Pension Fund will and hereby do move to exclude testimony concerning certain opinions set forth in the Expert Report of Professor Wayne Guay dated August 7, 2019 (defined below), based on Federal Rules of Evidence 702 and 403, and related case law.

Plaintiffs' motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the materials cited therein, the pleadings and papers on file in this matter, oral argument, and such other materials and argument as may be presented.

STATEMENT OF RELIEF SOUGHT

Plaintiffs seek an order excluding testimony regarding the following opinions offered by Guay:

1. That the Individual Defendants' decisions to purchase, sell, or refrain from trading in Twitter stock were "economically rational" and thus "contrary to an allegation of an intent to defraud" (Report, ¶¶8, 42, 46, 56, 92);

2. That the Individual Defendants engaged in trading behavior during the Class Period that is "inconsistent with Plaintiffs' allegations that they used allegedly material, non-public information for their benefit" (Report, ¶¶8, 41, 42, 81, 91, 92); and

3. Regarding the reasons for, and the "reasonableness" of, the trading behaviors of the Individual Defendants and other Twitter executives (Report, ¶¶57, 71, 77, 78, 79, 81, 82, 92).

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I. INTRODUCTION[1]

This case concerns whether Twitter, Inc. and its former executive officers Richard Costolo and Anthony Noto (collectively, the "Individual Defendants") are liable for misleading investors about the two things most critical to Twitter's success: user growth and engagement. Defendants offer the expert testimony of Wayne Guay, a professor of accounting at the Wharton School of Business. His proposed testimony regarding the Individual Defendants' trading in Twitter stock impermissibly opines on Defendants' (and other Twitter executives') state of mind, improperly (and incorrectly) instructs the jury on the applicable law, and is not based on a reliable methodology or indeed any methodology at all. For the reasons set forth below, Guay's testimony regarding the opinions set forth in ¶¶8, 41-42, 46-47, 48 n.86, 51, 56-57, 71, 77-79, 81, and 91-92 of his Report should be excluded.

First, Plaintiffs request that the Court exclude Guay's testimony regarding the Individual Defendants' purportedly "economically rational" reasons for their trading behaviors and his tautological conclusion that this "economically rational" conduct "cannot be used to support an allegation of an intent to defraud." *See* Report, ¶¶8, 42, 46, 56, 92. Guay's assessment of the purity of the Individual Defendants' motivations is nothing more than an opinion about their state of mind, and should be rejected. Furthermore, Guay's opinion that the Individual Defendants' trading behavior was "economically rational" is not helpful to the jury because it is based on a proposed standard that Guay himself has neither quantified nor defined.

Second, Plaintiffs request that the Court exclude Guay's testimony that the Individual Defendants' trading behaviors were "inconsistent with Plaintiffs' allegations that they used allegedly material, non-public information to their benefit." *See* Report, ¶¶8, 41-42, 81, 90-92. This opinion ignores that a financial motive, or indeed any motive at all, is not a requirement of proving intent to defraud (and was not pled by Plaintiffs). Guay incorrectly assumes profit motive is necessary to

[1] All exhibits referenced herein are attached to the Declaration of Gregg S. Levin in Support of Plaintiffs' Motion to Exclude Expert Testimony of Professor Wayne Guay ("Levin Decl."), filed concurrently herewith. "Report" refers to Guay's August 7, 2019 Expert Report and is attached as Exhibit A to the Levin Decl. "Guay Depo." refers to the transcript of Guay's August 28, 2019 deposition and is attached as Exhibit B to the Levin Decl. All emphasis is added and citations are omitted unless otherwise noted.

show scienter, and to allow him to testify as to this misunderstanding of the law would only mislead the jury. Furthermore, to the extent Guay proposes to testify that the Individual Defendants did not sell stock during the Class Period, that is hardly a matter that requires expert testimony. Accordingly, this testimony should be excluded.

Third, Plaintiffs request exclusion of Guay's testimony regarding the purported motives for and "reasonableness" of the Individual Defendants' and other Twitter executives' trades in Twitter shares, including testimony regarding the cancellation of certain executives' trading plans, and Noto's Class-Period purchases of stock. *See* Report, ¶¶8, 47, 48 n.86, 51, 56-57, 71, 77-79, 81-82, 92. This testimony should be excluded because it improperly addresses Defendants' and others' state of mind and credibility, and amounts to nothing more than an attempt to usurp the jury's role as fact-finder. The jury should be permitted to draw its own inferences and conclusions from the available deposition testimony and document evidence – ***not*** Guay's interpretation of it.

This Court should not countenance Defendants' attempt to confuse the issues, introduce bare denials of liability disguised as expert opinion, and mislead the fact-finder with unreliable testimony in the hopes of overcoming the compelling scienter-related evidence against them. Guay's testimony concerning Defendants' state of mind and credibility and his misstatements of the law should be excluded.

II. LEGAL STANDARDS

Federal Rule of Evidence 702 "control[s] the admissibility of" expert testimony. *Primiano v. Cook*, 598 F.3d 558, 563-64 (9th Cir. 2010), *amended* (2010). Under that rule, an expert who is qualified "by knowledge, skill, experience, training, or education" may offer opinion testimony if "(a) the expert's [specialized knowledge] will help the trier of fact understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; ***and*** (d) the expert has reliably applied the principles and methods to the facts of the case." Expert testimony is reliable where "the reasoning or methodology underlying the testimony is scientifically valid and can properly be applied to the facts in issue," and the court is satisfied that "the expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *United States v.*

Ruvalcaba-Garcia, 923 F.3d 1183, 1188-89 (9th Cir. 2019) (citing *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 593-94 (1993)), *petition for cert. filed*, No. 19-6277 (Oct. 9, 2019); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) (explaining that a court must determine whether the expert, "basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual vigor that characterizes the practice of an expert in the relevant field").

In addition to the reliability requirement, expert testimony must also be helpful and useful to the trier of fact. Relevant expert testimony is that which will "assist the trier of fact" because "the knowledge underlying it has a valid connection to the pertinent inquiry." *Primiano*, 598 F.3d at 564; *see also Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007) (noting the "central concern" of Rule 702 is whether expert's testimony "is helpful to the jury"). "This requirement is more stringent than the relevancy requirement of Rule 402 of the Federal Rules of Evidence, 'reflecting the special dangers inherent in scientific expert testimony.'" *Volterra Semiconductor Corp. v. Primarion, Inc.*, 2013 WL 6905555, at *15 (N.D. Cal. Nov. 18, 2013). And, of course, expert testimony may be excluded pursuant to Federal Rule of Evidence 403 if its probative value is outweighed by "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403; *see Rogers v. Raymark Indus., Inc.*, 922 F.2d 1426, 1430 (9th Cir. 1991).

The burden of establishing the admissibility of expert testimony falls on the party seeking its admission. *See Lust ex rel. Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

III. GUAY'S OPINION THAT THE INDIVIDUAL DEFENDANTS' TRADING BEHAVIORS ARE "ECONOMICALLY RATIONAL" SHOULD BE EXCLUDED

Guay opines that the trading behaviors of the Individual Defendants and other Twitter insiders before and during the Class Period were reflective of "***economically rational***" trading behaviors of executives at newly-public companies, and thus cannot support an inference of scienter. Report, ¶¶8, 42, 46, 56, 92. Guay further opines that Defendants' transactions in Twitter stock were based on "diversification, liquidity, and signaling reasons," and were therefore "economically rational" and "***contrary to . . . an intent to defraud***." *Id.*, ¶42. Guay concludes, therefore, that

Costolo's and Noto's trading behavior before and during the Class Period was "unsurprising" and "consistent with a . . . ***non-nefarious motivation***." *See id.*, ¶¶8, 46, 56, 92.

Guay's attempt to provide innocent, *post-hoc* rationalizations for the Individual Defendants' stock trading activities (or lack thereof) is inherently testimony about their "'intent, motive, or state of mind,'" which "[c]ourts 'routinely exclude'" as "'outside the scope of expert testimony.'" *Miranda v. U.S. Sec. Assocs., Inc.*, 2019 WL 2929966, at *1 (N.D. Cal. July 8, 2019) (collecting cases); *see also Lopez v. I-Flow, Inc.*, 2011 WL 1897548, at *11 (D. Ariz. Jan. 26, 2011) (noting that "myriad other courts have . . . excluded this type of testimony"). That is because "[e]xpert testimony as to intent, motive, or state of mind offers [the jury] no more than the drawing of an inference from the facts of the case." *Siring v. Or. State Bd. of Higher Educ. ex rel. E. Or. Univ.*, 927 F. Supp. 2d 1069, 1077 (D. Or. 2013). Guay's testimony that Defendants' trading behaviors are "contrary to an allegation of an intent to defraud" (Report, ¶42) usurps the jury's role as fact-finder by telling them what inferences to draw from the evidence, and is of the type that is generally excluded in securities cases for that very reason. *See, e.g.*, *Bona Fide Conglomerate, Inc. v. SourceAmerca*, 2019 WL 1369007, at *17 (S.D. Cal. Mar. 26, 2019) ("'[e]xpert evidence should not be permitted to usurp . . . the role of the jury in applying the law to the facts before it'"); *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 2018 WL 6511146, at *3 (N.D. Cal. Dec. 11, 2018) (noting that "'it is the jury that decides'" whether the facts "'warrant an inference that [defendant] acted knowingly'"); Amended Minute Order at 2, *In re JDS Uniphase Corp. Sec. Litig.*, No. 02-01486CW (N.D. Cal. Oct. 9, 2007) (ECF No. 1692) at 2 (regarding Guay, holding that he "can talk about facts, but cannot draw inferences"). Because the jury is "capable of drawing its own inferences" regarding whether Defendants acted knowingly, Guay's testimony is neither necessary nor helpful. *Siring*, 927 F. Supp. 2d at 1077.

Guay's opinion that the Individual Defendants' trading behavior was "economically rational" also should be excluded because no methodology supports it. *See* Fed. R. Evid. 702(c) (testimony must be "the product of reliable principles and methods"). Guay makes no effort to articulate or apply reliable principles or methodology to compare the actions of his hypothetical rational actors to the actions of the Individual Defendants. Rather, Guay testified that "economically rational" does

not have a specific definition, but is "a very, very, very broad term" that can be used to "describe all sorts of actions" taken "by . . . all types of people." Guay Depo. at 45:7-23; *see also id*. at 43:25-46:2 (testifying that "economically rational" is not "a term of art," "doesn't have a specific definition," "depends on the context," and that "others may have different definitions"). Pushed for clarification, Guay simply stated that "economically rational" is a term that "applies to a lot of decisions that individuals make in all sorts of settings." *Id*. at 45:19-23.

Using this untestable standard, in turn, provides Guay with the unfettered ability to assume away Defendants' fraud. Guay confirmed that "economically rational" and "non-fraudulent" are synonymous for purposes of his opinions – in other words, because he judges the Individual Defendants' behavior to be "economically rational" (whatever that means), it cannot be fraudulent. *Id*. at 46:3-10, 46:23-47:6, 47:18-48:8. Nor does Guay articulate a methodological basis for determining that the Individual Defendants' trading behavior meets his definition of "economically rational," however inscrutable it may be. He did not communicate with Costolo or Noto, did not review their personal financial records, and did not inquire about their compensation, finances, consumption needs, or total wealth (aside from what is contained in publicly-available information in SEC filings) before opining that their financial decisions were "economically rational," "unsurprising," and "consistent with a . . . non-nefarious motivation." Report, ¶¶42, 46, 92; *see also* Guay Depo. at 33:14-34:8, 52:4-9, 54:10-14. Indeed, Guay's testimony is not based on anything other than what he would "expect to observe in a world where there was no intent to defraud." Guay Depo. at 46:23, 48:15; *see also id.* at 47:18-48:8 (Defendants' trading "behavior is consistent with what I would expect these executives to be doing in the absence of the allegations to defraud"); 106:14-21 ("the trading behavior is what I would expect from executives that are trading for [non-fraudulent] reasons").

The foregoing testimony is entirely speculative and inadmissible. *Siring*, 927 F. Supp. 2d at 1078 (prohibiting expert from opining about "the unexpressed reasons for [defendants'] decisions"). Guay's approach regarding what behavior can be considered "economically rational" and thus *ipso facto* "non-nefarious" is also devoid of any measurable analysis and therefore fails to satisfy the requirements of Rule 702. *See, e.g.*, *Atmel Corp. v. Info. Storage Devices, Inc.*, 189 F.R.D. 410, 416

(N.D. Cal. 1999) (excluding expert testimony because opinion was merely "conclusory statement" offered without any methodology under which expert arrived at conclusion); *see also U.S. Equal Emp't Opportunity Comm'n v. MJC Inc.*, 2019 WL 2992013, at *5 (D. Haw. July 9, 2019) (excluding as unreliable expert's opinion where proponent had not shown the opinion was "based on something more than [the expert's] subjective belief").

The Court should exclude Guay's testimony that the Individual Defendants' trading behavior was "economically rational" and "contrary to an intent to defraud" (Report, ¶¶8, 42, 46, 56, and 92) because it is improper opinion about Defendants' intent and state of mind, unsupported by any methodology, and based only on Guay's speculation.

IV. GUAY'S OPINIONS REGARDING THE INDIVIDUAL DEFENDANTS' LACK OF FINANCIAL BENEFIT FROM THEIR TRADING BEHAVIOR DURING THE CLASS PERIOD SHOULD BE EXCLUDED

Guay also opines that, if executives are going to engage in fraudulent behavior that deceives investors, they expect to receive some benefit (typically financial) from it. *See* Report, ¶¶8, 41-42, 81, 91-92; Guay Depo. at 40:12-41:4, 61:18-62:7. Based on this unsupported assumption regarding the mental state of corporate executives, Guay further opines that "the absence of stock sales during the Class Period (as well as the lack of arguments that the Individual Defendants received any other financial benefits from the alleged fraud through bonuses or other forms of compensation) shows that the ***Individual Defendants received no financial profit from the fraud*** Plaintiffs allege in this case." Report, ¶41. *See also* Guay Depo. at 98:10-99:8, 206:15-211:9. Readily conceding that he "[does not] know what the actual mental state of either [Individual] [D]efendant was" (*Id*. at 68:22-24), Guay nevertheless concludes in circular fashion that the lack of financial benefit shows there was no intent to deceive. Report, ¶8 (finding trading behavior that did not result in a "benefit" to be "inconsistent with Plaintiffs' allegations" of fraud); Guay Depo. 105:15-107:16 (that the Individual Defendants were "foregoing [sic] financial profits" from stock sales "would be inconsistent with the plaintiffs' allegations"). As above, these incursions into the Individual Defendants' state of mind are impermissible and should be excluded. *See Oracle*, 2018 WL 6511146, at *3 (precluding expert testimony on "'intent, motive, or state of mind'"). Guay is not capable of, and should not be

permitted to, testify about what Defendants believed or expected would be the result of their fraudulent behavior. *Siring*, 927 F. Supp. 2d at 1077.

Guay's opinions regarding the Individual Defendants' "personal profit" or "personal benefit" as it relates to their scienter are also excludable because Guay egregiously misstates the law and allowing him to essentially instruct the jury based on his misunderstanding would be confusing, misleading, and improper. Guay's testimony on this topic reveals his lack of familiarity with the legal standard for scienter and his corresponding mistaken assumption that scienter requires a showing of motive, whether financial or otherwise. Guay testified that he understands scienter "from a layperson's perspective, to mean motivations or incentives to engage in certain types of behavior." Guay Depo. at 14:1-5; *see also id.* at 66:4-19 ("from my general experience . . . part of these complaints is generally to show that the executives had some motive to engage in the behavior"); 104:24-105:6 ("Q. And you're not aware of the legal significance of the fact that defendants received no financial profit from their fraud . . . correct? A. I don't think I know what the legal significance is."); 199:15-19 ("Q. And you don't know the legal significance of the fact that they did or did not make financial gains on the question of their state of mind? A. I don't."). But the law is clear that motive is ***not*** required to demonstrate scienter. The Ninth Circuit holds that "[s]cienter can be established even if the officers who made the misleading statements did not sell stock during the class period." *No. 84 Employer-Teamster Joint Council Pension Tr. Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 944 (9th Cir. 2003). And the Supreme Court holds that "the absence of a motive allegation is not fatal" to a claim for securities fraud. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 325 (2007).[2] This Circuit's Model Civil Jury Instruction on scienter, accordingly, does not make ***any*** reference to motive, let alone to "personal profit." *See* Ninth Circuit Civil Model Jury Instructions, No. 18.5 Securities – Knowingly. Because intent to

[2] *Accord In re Entropin, Inc. Sec. Litig.*, 487 F. Supp. 2d 1141, 1148-53 (C.D. Cal. 2007) (rejecting argument that "scienter [is] negated because [Defendants] did not sell their stock . . . when they could have realized a substantial profit"); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992) (reversing summary judgment on issue of scienter despite lack of insider sales where evidence showed defendants' actual knowledge); *Commodity Futures Trading Comm'n v. JBW Capital*, 812 F.3d 98, 108 (1st Cir. 2016) (lack of stock sales did not "rebut a finding of scienter" where there was "direct evidence not only that [defendant] had accurate information . . . but also that he intentionally or recklessly withheld that information from investors").

deceive – scienter – is not dependent upon insider trading or personal financial motive, Guay's testimony rests on a faulty legal premise. It should therefore be excluded as misleading and irrelevant. *See Quinn v. Fresno Cty. Sheriff*, 2012 WL 2995477, at *8-*9 (E.D. Cal. July 23, 2012) (excluding expert who did not apply correct legal standard because expert's testimony could "confuse and mislead the jury").[3]

It is true that the Ninth Circuit permits an expert to "'be called upon to aid the jury in understanding the facts in evidence, even though reference to those facts is couched in legal terms.'" *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004). But what remains of Guay's testimony – once it is divorced from the improper state-of-mind opinions and mistaken legal principles – is bare fact testimony that the Defendants did not sell any stock during the Class Period. Certainly, the jury does not require an expert to "aid" them "in understanding" that purported fact (which is, in any event, not entirely true: during the Class Period, Noto leveraged 191,581 shares worth over $8 million to satisfy his tax liabilities, and Costolo did the same with $3 million worth of shares). *Hangarter*, 373 F.3d at 1017. The jury likewise requires no help in understanding that if the Defendants did not sell stock, they also "did not profit through selling at allegedly inflated prices." Report, ¶91. Guay concedes as much. Guay Depo. at 108:23-109:14 ("A. My point is a simple one, that by allowing the [Rule 10b5-1] plan to continue, [Costolo] would have sold those shares at a higher price relative to what the price was at the end of the class period than if he had canceled the plan. Q. And . . . we know that just from looking at the historical stock prices. A. Well, yes, ***so that's true just based on the stock prices***. The inference of it being inconsistent with the plaintiffs' allegations would be that, by doing that, he had some foregone [sic]

[3] It should be noted that Plaintiffs do not agree that Defendants had no motive to commit fraud. As the Court has already recognized, "the[] Complaint does not rely on allegations of an improper financial motive to demonstrate scienter, nor does it reference stock sales," but instead Plaintiffs claim "that Defendants were motivated by an attempt to live up to the overly optimistic promises made at Analyst Day." ECF No. 113 at 40. Guay acknowledged at his deposition that his opinions "relate to economic behavior and economic incentives," and that if Plaintiffs alleged "some other kind of benefit, then that wasn't clear to [him]." Guay Depo. at 62:24-63:8, 64:4-11; *see also id.* at 210:25-211:4 ("my understanding is that plaintiffs are alleging that somehow Mr. Costolo and Mr. Noto received some benefit from this material non-public information"). Guay also agreed that executives can be motivated by a variety of ***non***-financial objectives, including preserving their jobs and reputations. Guay Depo. at 99:9-100:5.

profits, yes."). Because "an expert should be allowed to state findings as to what happened ***only*** as to those specific aspects as to which his specialized knowledge [and] training . . . are critical to the analysis," Guay's testimony is improper and should be excluded. *See Biotechnology Value Fund, L.P. v. Celera Corp.*, 2015 WL 138168, at *1 (N.D. Cal. Jan. 9, 2015) (emphasis in original).

Guay's testimony that "the Individual Defendants received no financial profit from the fraud . . . allege[d] in this case" (Report, ¶41) should be excluded as impermissible expert opinion on state of mind, premised on an incorrect understanding of the law, and on a matter well within the common understanding of the average juror.

V. GUAY'S OPINIONS REGARDING THE REASONS FOR, AND "REASONABLENESS" OF, DEFENDANTS' TRADING BEHAVIOR SHOULD BE EXCLUDED

Continuing his improper excursion into others' motives, Guay proposes to testify regarding the reasons for, and reasonableness of, these trading decisions: Costolo's sale of $33.4 million in Twitter stock before the Class Period; Costolo's and other executives' subsequent cancellation in February 2015 of their Rule 10b5-1 trading plans (effectively preventing them from further trading); and Noto's purchase of Twitter stock during the Class Period. Specifically, Guay proposes to testify that:

- Costolo's $33.4 million sale of Twitter stock before the Class Period was "***unsurprising***," and was both "***consistent with***" and "***motivated by***" a need to diversify his portfolio (Report, ¶¶8, 47, 48 n.86, 51, 56);
- The cancellation of trading plans by Costolo and other executives (including the Chair of the Board, the President of Global Revenue, and Twitter's General Counsel) in February 2015 was "***motivated*** at least in part by . . . the investment community's reaction" to Costolo's above-referenced stock sales and is "consistent" both with "***concern***[]" over "how their actions were perceived by the public" and the executives' "***desire*** . . . to demonstrat[e] to the public that they believed in the long-term value of the Company" (Report, ¶¶57, 71, 77-79, 81-82); and
- Noto's purchase of 13,294 shares (1% of his total Twitter stock holdings) was "because of his ***confidence*** in the Company" and "to send a positive signal to the market" (Report, ¶92).

As with the other deficient opinions identified herein, Guay's testimony as to "why [Costolo, Noto, and other Twitter executives] did or did not take a particular action" are excludable as impermissible expert testimony on these individuals' state of mind. *Oracle*, 2018 WL 6511146, at

*3; *see also Gold v. Lumber Liquidators, Inc.*, 323 F.R.D. 280, 294 (N.D. Cal. 2017) ("[I]ntent, motive, [and] state of mind" are "issues better left to a jury."). Put simply, Guay may not opine about Costolo's, Noto's, and other executives' "choices" or "decision-making." *In re Bard IVC Filters Prods. Liab. Litig.*, 2019 WL 1615080, at *4 (D. Ariz. Apr. 16, 2019).

Moreover, Guay's opinions regarding why the Individual Defendants and others purchased, sold, or did not sell Twitter stock are based on nothing more than his unquestioning acceptance of selected deposition testimony and documents. Guay acknowledged during his deposition that he did not "know with certainty why . . . they did what they did at any point in time." Guay Depo. at 135:1-5; *see also id.* at 60:15-19 (agreeing that he "would not" be able to offer an opinion on Defendants' state of mind). Nevertheless, Guay definitively concludes the Defendants' trading behavior is "***based on diversification, liquidity and signaling reasons***," and "cannot be used to support an allegation of an intent to defraud." Report, ¶8; *see also id.*, ¶47 (citing a triple-hearsay email for the reasons Costolo sold stock leading up the Class Period); ¶¶79-80 (chastising Plaintiffs' expert for not "accepting Mr. Costolo's explanation" for his trading plan cancellation, and crediting the same testimony);[4] ¶92 (opining on Noto's "stated intent" for purchasing shares based on a private email Noto wrote). This testimony is plainly an improper opinion on witness credibility and should be excluded on that basis. *Volterra*, 2013 WL 6905555, at *25 ("It is well-established that an expert may not invade the province of the jury by testifying about the credibility of witnesses.").

Underscoring that Guay seeks simply to "'substitute [his] judgment for the jury's,'" *United States v. Diaz*, 876 F.3d 1194, 1197 (9th Cir. 2017), is the fact that Guay did not apply any particular expertise or experience in reaching his conclusions, but merely accepted the Defendants' explanations for their trading behavior at face value. *See*, *e.g.*, Report, ¶¶47, 80, 92. Indeed, Guay failed to perform any analysis above and beyond what the jury could perform: he confirms he has not reviewed either Defendants' personal financial records, has not done any analysis of Noto's total

[4] Guay's testimony on this topic is particularly problematic because it is disconnected from Costolo's actual deposition testimony. At deposition, Costolo was unable to state with any certainty why he canceled his trading plan. *Compare* Deposition Transcript of Richard Costolo, dated March 25, 2019 (Ex. C) at 325:7-23 *with* Guay Depo. at 181:21-185:18. Guay ultimately conceded during his deposition that "there's a possibility" that other factors beyond media scrutiny could have played a role in Costolo's cancellation of his trading plan. *Id.* at 185:13-18.

wealth relative to his Class-Period stock purchases, and has not considered whether Costolo or any other executives were aware of material non-public information at the time of their sales or their cancellations. *See* Guay Depo. at 33:14-34:8; 85:1-86:14; 148:1-10; 159:6-160:16. At deposition, Guay could only describe his methodology as "looking at" whether the evidence was "consistent or inconsistent" with Plaintiffs' allegations – which is precisely the function of the jury. Guay Depo. at 92:15-23; *see also id.* at 160:18-22. Guay's proposed testimony that Costolo, Noto, and others had "non-nefarious" reasons (Report, ¶92) for their trading does no more than summarize cherry-picked documents and testimony without any application of specialized knowledge, and draw speculative inferences about these executives' state of mind. Because weighing the evidence and drawing inferences from it are tasks exclusively within the jury's purview, Guay's testimony about the reasons for Defendants' trading should be excluded. *See United States v. Pac. Gas & Elec. Co.*, 2016 WL 1640462, at *2 (N.D. Cal. Apr. 26, 2016) ("[I]t would be improper for [plaintiff's expert] to 'simply rehash otherwise admissible evidence about which he has no personal knowledge.'").

Guay's opinion that Noto's purchase of Twitter stock during the Class Period was "'to send a positive signal to the market'" (Report, ¶92) is excludable on the additional bases that Guay once again misapprehends the law and addresses a matter that is within the common understanding of the average juror. As discussed above, Guay is not a legal expert, and admits he "do[es] [not] know what legal significance it has if an executive purchases shares at an inflated price." Guay Depo. at 86:11-14. Yet, he appears poised to opine that Noto's purchase of Twitter shares amounting to less than 1% of his total Twitter holdings negates Plaintiffs' claim of securities fraud. Report, ¶¶8, 92. But the purchase of shares does not insulate an executive from liability for securities fraud or negate a finding of scienter. *See, e.g.*, *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 691 (6th Cir. 2004) ("We also reject the Individual Defendants' contention that their purchase of shares during the Class Period refutes any inference that they knowingly or recklessly mislead the market to increase the stock's price."). Guay should not be allowed to mislead the jury into believing that the law says otherwise. *Diaz*, 876 F.3d at 1197 ("[T]his court has repeatedly affirmed that 'an expert witness cannot give an opinion as to . . . an ultimate issue of law.'"); Fed. R. Evid. 702.

Moreover, once Guay's opinion regarding Noto's stock purchase is stripped of the improper state of mind and legal opinions, all that is left is the unremarkable fact that Noto incurred a cost that he would otherwise have avoided "if he had not purchased these shares during the Class Period." Report, ¶92. Guay said at deposition that he was "simply . . . point[ing] out that" Noto's share purchase "would have cost him financially." Guay Depo. at 75:17-76:9; *see also id.* at 77:2-11 ("A. . . . if the plaintiffs' allegations are correct, this would have been costly . . . for Mr. Noto. Q. And that's all? A. Primarily as a summary, yes, with respect to that purchase."); *see also id.* at 81:18-82:10 (noting that if the share price was inflated, Noto's purchase was "financially costly"). As Guay admits, "[w]hat [he] did with respect to Mr. Noto's trades is simply a calculation." Guay Depo. 85:1-13. The jury is absolutely capable of doing the same "calculation," and do not require Guay (or any other expert) to explain to them that Noto's purchase "cost him a fair bit of cash." Guay Depo. at 76:10-21; *see Wagner v. ABW Legacy Corp, Inc.*, 2016 WL 880371, at *8 (D. Ariz. Mar. 8, 2016) (excluding expert testimony that was "within the common understanding of the jury").

VI. CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that the Court exclude Guay's testimony (1) that the Individual Defendants' decisions to purchase, sell, or refrain from trading in Twitter stock were "economically rational" and thus "contrary to an allegation of an intent to defraud" (Report, ¶¶8, 42, 46, 56, 92); (2) that the Individual Defendants engaged in trading behavior during the Class Period that is "inconsistent with Plaintiffs' allegations that they used allegedly material, non-public information for their benefit" (Report, ¶¶8, 41, 42, 81, 91, 92); and (3) regarding the reasons for, and the "reasonableness" of, the trading behaviors of the Individual Defendants and other Twitter executives (Report, ¶¶57, 71, 77, 78, 79, 81, 82, 92).

DATED: January 28, 2020

Respectfully submitted,

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I hereby certify under penalty of perjury that on January 28, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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